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IN THE

Supreme Court of the United States

DAVID A. ZUBIK, ET AL., *Petitioners*,

v.

SYLVIA BURWELL, ET AL., *Respondents*

[Additional Captions Listed on Inside of Cover]

On Writs of Certiorari to the United States Court of Appeals for the Third, Fifth, Tenth, and D.C. Circuits

Brief of The Knights of Columbus as *amicus curiae* in support of Petitioners

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v.

SYLVIA BURWELL, ET AL., *Respondents*

EAST TEXAS BAPTIST UNIVERSITY, ET AL., *Petitioners*,

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SOUTHERN NAZARENE UNIVERSITY, ET AL., *Petitioners*,

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INTERESTS OF THE AMICUS CURIAE[1]

The Knights of Columbus ("Order") is a fraternal benefits society founded in New Haven, Connecticut in 1882 by Father Michael J. McGivney. He sought to affirm Catholic men in their faith and to help them exercise it in their everyday lives.

Because the Catholic Church teaches that human dignity requires religious liberty and because the latter half of the 19th Century was a time when nativists, the Ku Klux Klan, and other anti-Catholic groups sought to restrict religious exercise by Catholics, the Order has, from its founding, fought to protect this precious freedom. The Order, for example, opposed the persecution of Catholics in Mexico in the 1920s. It underwrote the litigation in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), a case recognizing the fundamental right of parents to direct the education and upbringing of their children.[2] *Pierce* is the foundational case for the freedom of parochial and other private schools.

Today, 134 years after its founding, the Knights of Columbus remains a thoroughly Catholic organization, committed to its core principles of charity, unity, fraternity, and patriotism. Through

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[1] The parties' counsel were timely notified of and consented to the filing of this brief. Neither a party nor its counsel authored this brief in whole or in part. No person or entity other than amici curiae or their counsel made a monetary contribution to the preparation and submission of this brief.

[2] See *Conflict in Paradise: The Oregon Knights of Columbus vs. the Ku Klux Klan, 1922-1925*, Faith Patterns (December 2, 2014), http://www.faithpatterns.com/2014/12/02/conflict-in-paradise-the-oregon-knights-of-columbus-vs-the-ku-klux-klan-1922-1925/ (last visited Jan. 8, 2016).

its Catholic Information Service, it provides rich educational programs and materials to inform and deepen the Catholic faith of its members and others. The Order now has almost 1.9 million members in over 15,000 councils in seventeen countries. The largest number of members is in the United States.

As part of its religiously-motivated mission, the Knights of Columbus raises and donates millions of dollars to charitable causes in the United States and abroad. Every year its members contribute millions of hours to charitable causes. Last year alone, the Order donated $174 million and 72 million service hours. It does all of this precisely because of its Catholic values.

By mandating that the Order's self-funded health plan for its employees include contraceptives, abortion-inducing drugs, sterilization, and related counseling, the government has sought to force the Order to violate its deeply held Catholic values. By narrowly defining the religious employer exemption, the government has declared that the Order is not religious enough to warrant protection for those values. It is for these reasons that the Knights of Columbus respectfully submits this amicus brief.

SUMMARY OF ARGUMENT

Because the government's so-called "accommodation" to its CASC Mandate[3] substantially burdens religious exercise under *Burwell* v. *Hobby Lobby*, 134 S. Ct. 2751 (2014), the government cannot prevail unless it proves that forcing Catholic and protestant ministries to comply with this mandate—whether through the accommodation or otherwise—satisfies "the most demanding test known to constitutional law." *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997); 42 U.S.C. § 2000bb-1(b).

The government cannot meet this "most demanding test" because its CASC Mandate is shot through with holes. It has voluntarily left huge swaths of the population unprotected by the Mandate's basic promise—employees will have access to free CASC services through their employer—to satisfy religious and secular concerns.

First, the government has agreed to exempt religious employers from the CASC Mandate *if* the IRS says they do not have to file an informational tax return each year. Next, the government has left "tens of millions" outside the CASC Mandate's protections ostensibly to advance higher order policy objectives—like promoting small businesses or following through on the President's promise that people can keep their plans under the Affordable Care Act ("ACA").

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[3] Amici use the term "CASC Mandate" because what is generally referred to as the government's "contraception mandate" is actually much broader, covering contraceptives, abortion-inducing drugs and devices, sterilization, and related counseling.

It is with this weak hand that the government must pass "the most demanding test known to constitutional law." And the closer one gets to the facts, the weaker the government's case becomes.

Part I of this brief unpacks the implications of the government's bizarre choice to use a provision in the tax code to cleave religious ministries into two camps: those who are exempted from the CASC Mandate and those that are forced to comply. The government elected to build its exemption on 26 U.S.C. § 6033(a)(3), which was designed to decide which nonprofit organizations have to file an informational tax return.

Section 6033(a) was designed "for the purpose of carrying out the internal revenue laws," 26 U.S.C. § 6033(a)(1), and as such it makes good sense. Congress designed this provision more than fifty years ago to ferret out entities that were abusing their tax-exempt status to engage in income-producing activities, like lease-back schemes, unrelated to their exempt purpose. See Br. for Dominican Sisters of Mary, et al., as Amici Curiae Supporting Petitioners at 9, *Little Sisters of the Poor* v. *Burwell* (No. 15-105). But to tailor this demand for financial information, the Government exempted church-related entities and other entities when the Secretary of the Treasury "determines that such filing is not necessary to the efficient administration of the internal revenue laws." *Id.* at 11 (quoting 26 U.S.C. § 6033(a)(3)(B)) (internal quotation marks omitted).

So far so good. But to take these same rules and graft them into a completely different context, for a completely different purpose? Not surprisingly, the

IRS's criteria yield bizarre results when used as a way to identify "religious employers" exempt from the CASC Mandate.

Fifty-three Catholic elementary schools in the Archdiocese of Washington are exempt from the Mandate, but Mary of Nazareth Catholic Elementary School, near the Potomac River in Montgomery County Maryland, is not. *Why*? Because Mary of Nazareth, unlike most Catholic elementary schools, does not serve one parish—*it serves seven*. As such, it is incorporated separately and therefore must file an informational tax return with the IRS each year.

Catholic Charities of Erie and Catholic Charities of Pittsburgh have the same mission, but while the former is exempt from the Mandate, the latter is not. *Why*? Because Catholic Charities of Pittsburgh, though it is still under its bishop's leadership and serves as the diocese's primary social services agency, is incorporated separately, and the Erie agency is not.

Westminster Theological Seminary is not recognized as a "religious employer" under the CASC Mandate. *Why*? Because it was founded almost 100 years ago by professors who thought they needed to separate from Princeton Theological Seminary and the Presbyterian Church of which it was a part to preserve their theological integrity.

Reaching Souls International, an Evangelical Christian missions organization, likewise is not viewed by the HHS as a "religious employer." *Why*? Because it believes it serves God and the needy better by working alongside rather than from within a church or denomination.

This brief goes beyond Petitioners' submissions, sharing more of these ministries' stories to show the irrationality of the government's decision to deny they are "religious employers" for the purposes of the CASC Mandate. The government ostensibly chose this tax provision because it identifies ministries that "are more likely than other employers to employ people of the same faith." 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). But, as these facts show, that is not true. Not even close.

This wildly misconceived "religious exemption" means the government cannot prove a compelling interest in forcing its CASC Mandate on undeniably religious ministries like those before the Court.

Part II turns from the CASC Mandate's "religious employer" exemption to the secular exemptions that together leave "tens of millions" unprotected by the CASC Mandate: the grandfathered plan exception and the small employer exception.

Contrary to the government's predictions, the number of employers with grandfathered plans is not "quickly phasing down": a full 35% of firms that offer health benefits had grandfathered plans in 2015, down only two percent from the year before. *Thirty-seven million people* were enrolled in grandfathered plans in 2015, down *only one percent* from the year before. And about 28% of all workers, or 34 million people, work for small employers who are not required to offer their employees health insurance at all.

The government's attempts to satisfy "the most demanding test known to constitutional law" must be viewed in light of its decision to leave leave "tens of

millions" unserved by the Mandate. Giving an out to corporations who want to "avoid[] the inconvenience of amending an existing plan," *Hobby Lobby*, 134 S. Ct. at 2780, makes it hard for the government to prove it has a compelling interest in enforcing the CASC Mandate against Catholic schools and Evangelical seminaries with religious objections.

But these secular exceptions also weaken the government's ability to satisfy the "exceptionally demanding" least restrictive means test. It stands to reason that the government would not leave tens of millions unprotected by the CASC Mandate unless it was confident these people could get CASC services through other means.

One of those ways, Title X, deserves special mention. Congress gives HHS about $280 million each year to help make family planning services more readily available. The government says it cannot use these funds to give CASC services to women who work for ministries like Catholic Charities of Pittsburgh—Congress has tied its hands. And besides, says the government, using Title X to get contraceptives is too cumbersome.

Again, the government's protests ring false. True, Congress said that Title X funds are supposed to be used to help "low income families," but Congress gave HHS the authority to define this term however it sees fit. And HHS has already done so, rewiring Title X by regulation so that all girls under eighteen, rich and poor alike, can get free contraceptives from the government without their parents finding out.

As for the government's complaint that making free CASC services available through Title X would present too many "logistical and administrative

obstacles," The Guttmacher Institute—whose expertise HHS relied on in creating the CASC Mandate—disagrees. It says that Title X works better than insurance programs at "removing obstacles" to contraceptive access.

The facts and law presented here go beyond Petitioners' briefs and provide additional reasons why the government's attempts to impose its CASC Mandate on objecting ministries do not satisfy "the most demanding test known to constitutional law."

ARGUMENT

I. The government cannot have a compelling interest in forcing some ministries to comply with the CASC Mandate or the so-called accommodation when it has voluntarily excused others that are essentially identical.

In order to meet its burden under strict scrutiny, the government must prove it has a compelling interest in enforcing the CASC Mandate not just in the abstract but as applied to non-exempt religious ministries. The government cannot do so unless it proves there is a substantive difference between those few ministries that qualify for its cramped "religious employer" exemption and the many others that do not.

The government says there's a difference because the exempt religious employers that qualify under 26 U.S.C § 6033(a)(3)(A)(i) & (iii) "are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were

covered under their plan." 78 Fed. Reg. at 39,874. This was never more than indiscriminate guesswork by government regulators. And the facts don't bear it out.

To the contrary, the facts show how nonsensically narrow the government's religious exemption is. Moreover, rewarding or punishing a ministry on so trivial a basis as its standing under a single provision of the tax code undermines the government's alleged compelling interest in the Mandate.

Administrative agencies may not "act on hunches or wild guesses," particularly when, as here, they are freighted with such constitutional significance. See *Ethyl Corp.* v. *EPA*, 541 F.2d 1, 28 (D.C. Cir. 1976). The government's artificial demarcation between "religious employers" and nonexempt religious ministries does not survive even rational-basis review, much less the withering scrutiny that RFRA demands.

A. It is unreasonable to use a tax code provision to identify ministries with a deep religious identity or that hire like-minded employees.

While the government has agreed to exempt "religious employers" from the CASC Mandate, it only identifies as "religious employers" a narrow class of entities that are excused from having to file informational tax returns. 26 U.S.C. § 6033(a)(3)(A)(i) & (iii).[4] The government has defined

[4] For a detailed explanation of what Section 6033 is for and why it is an inappropriate way to identify religious employers, see Br. for Dominican Sisters of Mary, et al., as Amici Curiae

"religious employer" in this way because, it says, ministries that have to file informational tax returns are not as "likely" as "[h]ouses of worship and their integrated auxiliaries" "to employ people of the same faith who share the same objection" to "contraceptive services." 78 Fed. Reg. at 39,874.

No one is questioning that it makes sense for the IRS to ask for more financial information from some ministries than for others. But using this part of the tax code to decide which ministries are truly "religious employers" leads to bizarre conclusions. For proof, one need look no further than the ministries before this Court.

1. The exemption irrationally discriminates against the separately-incorporated ministries of Catholic dioceses.

Among the 146 plaintiffs that have challenged the government's accommodation are twelve Catholic dioceses and archdioceses, three of which are now before the Court: the Archdiocese of Washington, the Diocese of Pittsburgh, and the Diocese of Erie. The following goes beyond the Dioceses' briefs to highlight the bizarre and unreasonable results of the government's decision to use the tax code to decide which ministries are truly "religious employers" and therefore should get an exemption from the CASC Mandate.

Supporting Petitioners, *Little Sisters of the Poor* v. *Burwell* (No. 15-105).

a. The exemption irrationally discriminates among Catholic schools.

Within the Archdiocese of Washington are fifty-three elementary schools that are organized under the Archdiocese and, thus, are recognized as "religious employers." Pet. for Writ of Cert. at 15–16, *Roman Catholic Archbishop of Washington* v. *Burwell* (No. 14-1505). But one school in particular, Petitioner Mary of Nazareth Elementary School, is not exempt. *Id.* Why is this so?

Is it because Mary of Nazareth doesn't have a close working relationship with its Archbishop? No. To the contrary, it was founded in response to a call by Cardinal Hickey; his successor, Cardinal McCarrick, dedicated the school's current facility. Mary of Nazareth, *History/Timeline*, http://www.maryofnazareth.org/Group_Detail.aspx?iIndex=102&iModule=100 (last visited Jan. 8, 2016).

Is it because Mary of Nazareth doesn't depend on the Archdiocese for support? Again no. The school opened on farm property acquired by the Archdiocese, and its gymnasium was built with the Archdiocese's support. *Id.*

Is it perhaps because Catholicism doesn't play a central role in all that Mary of Nazareth does? Emphatically no. The school's mission is to "prepare[] children for lives of service to God and neighbor, through a rigorous academic program rooted in the faith and teachings of the Roman Catholic Church, as professed in the Creed, celebrated in the sacraments, lived in Christian

virtue and affirmed in prayer."[5] It implements the Archdiocese of Washington's model curriculum.[6] And its strategic plan is built on the Policies of Catholic Schools authored by Cardinal Wuerl.[7]

Rather, what separates Mary of Nazareth from other Catholic elementary schools is that it does not serve one Catholic parish—*it serves seven.* Mary of Nazareth came into being because the pastors of seven area pastors—at Cardinal Hickey's request—came together to establish a regional Catholic school, the first Catholic elementary school in the Archdiocese in thirty years. Mary of Nazareth, *History/Timeline.* These seven parishes continue to support Mary of Nazareth and take turns hosting its graduation ceremonies. *Id.*

If Mary of Nazareth were a typical Catholic school, it would simply be part of the parish it served and would therefore be exempt from the CASC Mandate. But because Mary of Nazareth has taken on a broader mission—*at the request of its Archbishop*—it has a different organizational structure, is not considered a "religious employer,"

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[5] Mary of Nazareth, *Mission & Philosophy*, http://www.maryofnazareth.org/Group_Detail.aspx?iIndex=101&iModule=100 (last visited January 6, 2016).

[6] Mary of Nazareth, *Curriculum Overview*, http://www.maryofnazareth.org/Group_Detail.aspx?iIndex=159&iModule=100 (last visited January 6, 2016).

[7] Mary of Nazareth, *Five-Year Strategic Plan*, http://www.maryofnazareth.org/document/handbook/MONFiveyearplan_2011_12_v3.pdf (last visited Jan. 8, 2016).

and is subject to the CASC Mandate's crippling fines.[8]

b. The exemption irrationally discriminates among Catholic social service ministries.

What is true of Catholic schools is also true of Catholic social service ministries. When the government applies Section 6033 of the tax ode to identify religious employers, Catholic Charities of Erie gets an exemption but Catholic Charities of Pittsburgh does not, even though the two are indistinguishable in most every respect. This is simply because the former is a department within the diocese while the latter is separately incorporated. See Br. for Petitioners at 55, 58, *Zubik* v. *Burwell* (14-1418 et al.) ("*Zubik*").

Catholic Charities of Pittsburgh is every bit as Catholic as its peer to the North. Catholic Charities of Pittsburgh still serves as "the primary social service agency of the Diocese of Pittsburgh." Catholic Charities of Pittsburgh, *Mission, Vision, Guiding Principles*, http://www.ccpgh.org/page.aspx?pid=354 (last visited Jan. 7, 2016). Its mission is shaped "by the Gospel values and social teachings of the Catholic Church." *Id.* Catholic Charities of Pittsburgh works to "foster effective partnerships" among the Catholic faithful, "including mobilizing the resources of the parishes of the Diocese of Pittsburgh." *Id.* And although it is not a

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[8] The Archdiocese of Atlanta has identified a similar disparity between two of its own schools. See Tr. of Oral Argument at 36-37, *Roman Catholic Archdiocese of Atlanta* v. *Burwell* (11th Cir. Feb. 4, 2015) (No. 14-12890), bit.ly/1OWjguw.

subsidiary of the diocese, Bishop Zubik is still at the helm, serving as the Chairman of its Membership Board. Pet. for Writ of Cert. at 11, *Zubik* v. *Burwell* (14-1418).

The fact that Catholic Charities of Pittsburgh is incorporated separately in no way suggests that it has diluted its Catholic identity or its relationship to its bishop. The government has no business making this presumption, and thereby pressuring Catholic Charities of Pittsburgh and similar ministries nationwide to abandon their chosen corporate status so that they can squeeze themselves into the government's mold.

2. The exemption irrationally discriminates against Protestant ministries whose independence from ecclesial control is key to their religious identity, mission, and witness.

The exemption's effect on other ministries is even more pernicious. While some ministries incorporate separately for merely practical reasons, others are independent of ecclesial control as a matter of religious principle. Petitioner Westminster Theological Seminary, for example, exists because its founders thought they had to break denominational ties to preserve their doctrinal integrity. Other Evangelical nondenominational or parachurch ministries like Petitioner Reaching Souls International have discerned that they, too, better serve God by working alongside churches but remaining independent from them.

The tax code may conclude that the "efficient administration of the internal revenue laws" requires

independent seminaries and missions organizations to file an informational tax return. See 26 U.S.C. § 6033(a)(3). Fair enough. But it is highly discriminatory for the government to deny that Westminster and Reaching Souls are "religious employers" because they have followed their religious convictions in this way.

a. Westminster Theological Seminary is independent from the PCUSA as a matter of principle.

Westminster Theological Seminary, an Intervenor Plaintiff-Appellee in the Fifth Circuit case, is a prime example of a religious institution that severed institutional ties to preserve its religious identity.

Westminster is a "nondenominational seminary in the Presbyterian tradition." Br. for Petitioners at 26, *E. Tex. Baptist Univ.* v. *Burwell* (No. 15-35) ("*ETBU*"). Its trustees must be elders in a Presbyterian church, and its faculty must assent to the Westminster Confession of Faith, a foundational document in the Presbyterian tradition. *Id.* Yet, "[f]or historical and theological reasons, Westminster is independent of any one church or denomination and, therefore, does not qualify as an 'integrated auxiliar[y]' under the special IRS rule for seminaries." *Id.*

These "historical and theological reasons" are instructive. Westminster's history begins with Princeton Theological Seminary, which was founded by the Presbyterian Church in the U.S.A. ("PCUSA") in 1812. Westminster Theo. Sem., *History*, http://www.wts.edu/about/history.html (last visited Jan. 7, 2016). Princeton Seminary had historically been a strong defender of biblical Christianity in

general and the Calvinistic school of theology in particular. *Id.* But in 1929 the PCUSA oversaw a radical overhaul that led to Princeton Seminary appointing new leaders who "declared that the belief in the infallibility of holy Scripture, the virgin birth, the bodily resurrection of our Lord, and the miracles of Jesus Christ [are] non-essential to the Christian Faith." Edwin H. Rian, *The Presbyterian Conflict* (1992), Chapter 3: The Reorganization of Princeton Theological Seminary, http://opc.org/books/conflict/ (last visited January 5, 2016).

In the wake of this revolution, four Princeton Seminary professors resigned and established Westminster Theological Seminary "to carry on and perpetuate the policies and traditions of Princeton Seminary as that institution existed prior to its reorganization by the General Assembly of the [PCUSA]." *Id.*, Chapter 4. The PCUSA did not take kindly to Westminster and told members they would "suffer discipline" if they associated with Westminster's independent missions board. *Id.*

This history continues to loom large at Westminster and guides its conviction that it must remain "independent of ecclesiastical control" in order to preserve its founding mission and its fidelity to biblical Christianity. *Id.*

The terms of the government's exemption would reward Westminster if it abandoned its independence and submitted itself to a denomination, even if this meant compromising its theological convictions.[9] Ironically, it is because

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[9] As such, the "religious employer" exemption violates an important public policy rooted in the First Amendment. This Court should avoid adopting or endorsing structures that "risk

Westminster's founders put their convictions ahead of their careers that the government now denies it is a "religious employer."

b. Reaching Souls International's calling is to work alongside, not within, Evangelical churches.

Reaching Souls International ("Reaching Souls"), one of the Petitioners from the Tenth Circuit, is likewise unambiguously religious and yet falls outside the government's narrow definition of a "religious employer."

Reaching Souls International is a Christian missions organization founded in 1986 by a Southern Baptist minister and evangelist. Br. for Appellees at 8, *Sebelius* v. *Reaching Souls*, 794 F.3d 1151 (10th Cir. 2015) (No. 14-6028). Its work is to train and equip evangelists and to care for orphans in Africa,

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disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'mainstream.'" *Hosanna-Tabor Evan. Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694, 711 (2012) (Thomas, J., concurring). Such structures may "cause a religious group to conform its beliefs and practices" to "the prevailing secular understanding" out of "fear or liability." *Id.* "These are certainly dangers that the First Amendment was designed to guard against." *Id*; see also *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 336 (1987) ("[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission." (footnote omitted)).

Cuba, and India. *Id.*; Reaching Souls Int'l, *Mission*, http://www.reachingsouls.tv/mission (last visited January 5, 2015).

Though Reaching Souls was founded by a Southern Baptist and adheres to the Southern Baptist Convention's core beliefs, it is not formally affiliated with the Southern Baptists. *Id.* at 16. In this way, Reaching Souls is representative of a large swath of Evangelical Christian ministries like Christian and Missionary Alliance Foundation, Geneva College, and Wheaton College. For religious and historical reasons, Evangelical Christian ministries typically do not have the sort of close financial and administrative ties to a particular church that the IRS reporting rules require. They are, rather, "parachurch" ministries—groups that work "alongside" churches by developing programs to address a specific social issue or to serve a particular need in the Christian community.

Since at least the nineteenth century, Evangelicals in America have favored nondenominational organizations as a more efficient way to address a particular issue and as a means of fostering cooperation between members of different churches that share common religious convictions.[10]

The terms of the government's exemption essentially punish this choice. To qualify under the government's definition of a "religious employer,"

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[10] *See, e.g.*, Michael S. Hamilton, *Evangelical Entrepreneurs: the Parachurch Phenomenon*, Christian History (Oct. 1, 2006), *available at* http://www.christianitytoday.com/ch/2006/issue92/6.33.html; *see also* George Marsden, *The Evangelical Denomination, in Evangelicalism and Modern America* vii, xiv-xv (George Marsden ed., 1984).

parachurch ministries like Reaching Souls would have to give up their calling to work alongside churches and denominations to promote interfaith cooperation.

3. The exemption irrationally discriminates against ministries that raise their own financial support.

Congress and Treasury have determined that "carrying out the internal revenue laws" does not require a church or any "integrated auxiliary" of a church to file an informational tax return. 26 U.S.C. § 6033(a), (a)(3)(A)(i). With the underlying purpose of § 6033(a) in mind, Treasury has defined an "integrated auxiliary" as an entity that was "internally supported"; one mark of such an entity is whether it receives most of its support from its church or whether it does its own fundraising. *Id.* § 1.6033-2(h)(1)(iii), (h)(4)(ii); 26 C.F.R. § 1.6033-2(h)(1)(iii).

Because the government has appropriated this distinction into the CASC Mandate context, whether a ministry qualifies for the "religious employer" exemption may turn on so insignificant a detail as whether its fundraising campaign is run out of its own office or out of the church it is affiliated with.

The Court has seen this sort of fifty-percent rule before. In *Larson* v. *Valente*, this Court held that rules that discriminate among religious groups based on how they raise their support "clearly grant[] denominational preferences of the sort consistently and firmly deprecated in our precedents." 256 U.S. 228, 246 (1982). A rule that denies a religious liberty claim on this basis "must be invalidated unless it is

justified by a compelling governmental interest" that is "closely fitted to further that interest." *Id.* at 247

4. The exemption irrationally discriminates against ministries whose activities are not "exclusively religious."

Finally, the government's exemption may hinge on whether a religious employer's activities are judged to be "exclusively religious." 26 U.S.C. § 6033(a)(3)(A)(iii). This requirement may be useful under some circumstances to decide whether a ministry must submit an informational tax return.[11] But it makes no rational sense as a basis on which to deny an exemption to ministries that are (merely) predominantly or very religious.

B. This arbitrary religious classification system belies the government's claim to a compelling interest in enforcing its mandate against non-exempt ministries.

To survive strict scrutiny, the government must first prove that enforcing its CASC Mandate against Mary of Nazareth Catholic Elementary School, Catholic Charities of Pittsburgh, Westminster Theological Seminary, and Reaching Souls International advances interests "of the highest order." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 546 (1993). "Only the gravest abuses, endangering paramount interest,

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[11] But see *Lutheran Soc. Serv. of Minn.* v. *United States*, 758 F.2d 1283, 1289 (8th Cir. 1985) (striking down application of "exclusively religious" requirement as "contrary to Congress' clear intent").

give occasion for permissible limitation."[12] *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963).

To meet this burden, the government must do more than recite "broadly formulated interests": it must provide a justification for not "granting specific exemptions to particular religious claimants." *Hobby Lobby*, 134 S. Ct. at 2779 (quoting *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006)) (internal quotation marks omitted). RFRA "contemplates a 'more focused' inquiry." *Id.*

All this means that in order to pass strict scrutiny the government must do more—much more—than rely on a hunch about how a ministry's corporate structure or fundraising practices correlate to its religious mission and hiring practices. Agencies may not "act on hunches or wild guesses," particularly when, as here, they are freighted with such constitutional significance. See *Ethyl Corp.*, 541 F.2d at 28. Nor may agencies draw such "categorical conclusion[s]" without reasoned explanation. See *Delta Air Lines, Inc.* v. *Exp.-Imp. Bank of U.S.*, 718 F.3d 974, 978 (D.C. Cir. 2013)

The government has admitted it has *no compelling interest* in forcing its CASC Mandate on religious groups that "are more likely than other

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[12] Public health and gender identity are certainly "important interests." *Hobby Lobby*, 134 S. Ct. at 2779. But even "important interests" usually fail the demanding compelling interest test. See *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114, 1143 (10th Cir. 2013) ("We recognize the importance of [the government's] interests [in public health and gender equality]. But they nonetheless in this context do not meet the Supreme Court's compelling interest standards.").

employers to employ people of the same faith." 78 Fed. Reg. at 39,874. It ostensibly decided to base its exemption on the tax code because it thinks Section 6033 is a sound means of identifying such employers. But this is not so.

There is nothing rational, let alone compelling, about forcing a Catholic school to open its health plan for CASC services just because the school serves seven parish instead of just one. The government must be held to strict scrutiny for its decision to withhold its exemption from unmistakably religious organizations based on their treatment under the tax code.

II. The government's decision to deny its exemption to religious ministries cannot survive strict scrutiny when it has deprived "tens of millions" of the right to CASC coverage through employer-sponsored plans.

What does it mean that the government insists on forcing its CASC Mandate on ministries like Mary of Nazareth Catholic Elementary School, even while it has voluntarily left "tens of millions" without the assurance that they can receive free CASC services through their employer? See *Hobby Lobby*, 134 S. Ct. at 2764 (quotation omitted).

This section documents facts that undercut the government's argument that it must hijack the plans of objecting religious ministries in order to advance its compelling interests in promoting "public health" and "gender equality." Contrary to the government's prediction, the numbers of people who fall under the two secular exceptions to the CASC Mandate remain massive and the number of people enrolled in

grandfathered plans has remained steady since this Court decided *Hobby Lobby* in 2014.

The government's decision to leave these tens of millions unprotected by the CASC Mandate's basic promise undercuts its ability to prove a compelling interest. It further suggests that the government is satisfied with its other means of ensuring women have access to CASC services. Surely the government thought through what its exemptions would mean for the women who work for small employers or firms with grandfathered plans and found the risks of their policy decisions worthwhile.

One of the alternative means suggested by Petitioners—making Title X benefits available to women who work for ministries—is worth special mention. The government has said Petitioners' suggestion will not work, but its complaints against its own program ring hollow. HHS clearly has the discretion to decide who gets Title X benefits. And The Guttmacher Institute has found that Title X is better than traditional insurance at "removing obstacles" to contraceptive access.

A. The government's nonreligious exemptions leave "tens of millions" outside the CASC Mandate.

The government's insistence that ministries like Catholic Charities of Pittsburgh, Mary of Nazareth Catholic School, Westminster Theological Seminary, and Reaching Souls International *must* be subjected to the CASC Mandate is especially weak given its decision to leave huge swaths of employees unprotected by the CASC Mandate's basic promise. In *Hobby Lobby*, this Court noted that the contraception mandate does not apply to tens of

millions of people. *Hobby Lobby*, 134 S. Ct. at 2764. This remains the case today.

First, while the government has claimed the grandfathered plan exception is "quickly phasing down," Br. in Opp. at 5 n.4, *Zubik* (No. 14-1418 et al.), these plans are nearly as prevalent today as they were when this Court decided *Hobby Lobby* in 2014. Thirty-five percent of firms that offer health benefits had grandfathered plans in 2015, down *only two percent* from the year before. *Thirty-seven million people* were enrolled in grandfathered plans in 2015, down *only one percent* from the year before. Kaiser Family Found. & Health Research & Educ. Tr., *Emp'r Health Benefits, 2015 Annual Survey*, 58, 214.

Second, the ACA's small business exception covers 96% of employer firms, which together employ about 28% of all workers, or 34 million people. Sean Lowry, *The Affordable Care Act and Small Businesses: Economic Issues*, 9 (Cong. Research Serv. Jan. 15, 2015); 26 U.S.C. § 4980H(c)(2) (firms with fewer than 50 full-time employees need not provide their employees with a health plan at all).

Taken together, because of the grandfathered exemption and the small employer exemption, well over 50 million American employees are excluded from the CASC Mandate's promise that people will receive free CASC coverage through their employer's group health plan.

B. The substantial burden the government has put on Petitioners' religious exercise cannot survive strict scrutiny while it is willing to leave "tens of millions" without guaranteed access to CASC services through employer-sponsored plans.

The government's willingness to leave tens of millions without guaranteed access to CASC services through employer-sponsored plans for *secular* reasons greatly impairs its ability to prove that imposing its Mandate on *religious* groups satisfies strict scrutiny. These facts show that that the government lacks a compelling interest in imposing the accommodation when it substantially burdens religious exercise. These secular exceptions also imply that the government is satisfied with the other means it has available to provide women with access to CASC services.

1. These secular exceptions may show that the government cannot prove a compelling interest because it has left "appreciable damage to [its] supposedly vital interest[s] unprohibited."

The government's decision to leave "tens of millions" without guaranteed access to free CASC services through their employers suggests that the CASC Mandate does not advance a compelling interest. A law "cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547.

The existence of the grandfathered plan exception and the small employer exception suggest that the

government in each case found policy interests that took precedence over its articulated interests in "public health" and "gender equality." In the small employer exception, it appears the desire to expand access to CASC services through employer health plans yielded to the desire to promote small businesses. The grandfathered exception probably reflects the political pressure the administration felt to make good on President Obama's promise that "[i]f you like your health care plan, you can keep your health care plan." But practically it gives an out to corporations who want to "avoid[] the inconvenience of amending an existing plan." *Hobby Lobby*, 134 S. Ct. at 2780.

These are legitimate policy choices, but surely neither is more important than the commitment to religious liberty reflected in the First Amendment and RFRA.

On the other hand, perhaps the government felt that these exemptions did not injure their interests much at all. That would make sense, as the government knew when it was designing these exceptions that almost all women had access to contraceptives *before* the CASC Mandate went into effect. According to the Institute of Medicine ("IOM") report, 99% of women who have ever had sex and 89% of currently sexually-active women use contraceptives. IOM, *Clinical Preventive Services for Women: Closing the Gaps*, at 103 (2011) ("IOM Report") (citing William D. Mosher & Jo Jones, *U.S. Dep't of Health and Human Servs., Use of Contraception in the U.S.: 1982-2008*, 5, 9 (2010)).

The government also created these exceptions knowing that the IOM Report was unable to show

any real correlation between cost and access to contraceptives. Only one paragraph in the entire report attempts to make this correlation, but the studies it relies on do not connect the dots. *Id.* at 109. The first study explores the connection between cost and access to preventive care generally, but it doesn't focus on contraception and collected data only from low income populations. *Id.*; Helen V. Alvaré, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 Vill. L. Rev. 379, 428–29 (2013). The second also says nothing about contraceptive access, as it studied women aged 65-69 enrolled in Medicare. IOM Report at 109; Alvaré at 429. Nothing in the report shows that women enrolled in an employer-sponsored health plan forgo contraception when it is not free.

Something is happening here. Perhaps the government has prioritized economic growth and political promises over religious liberty. Or maybe the government accepted that the alleged connection between free CASC services and public health is unproven. Either way, the existence of these two massive exceptions makes it harder for the government to justify overriding Petitioners' religious objections.

2. In the alternative, these secular exemptions may prove that the government is able to advance its interests in "public health" and "gender equality" in other ways.

Voluntarily leaving "tens of millions" unserved by the CASC Mandate's basic promise is also relevant to the "exceptionally demanding" least restrictive means test. *Hobby Lobby*, 134 S. Ct. at 2780. To

survive strict scrutiny, the government must prove that its chosen mechanism—hijacking ministries' private group health plans—is "actually necessary to achieve" its allegedly compelling interests. *United States* v. *Alvarez*, 132 S. Ct. 2537, 2549 (2012) (quoting *Brown* v. *Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011)) (internal quotation marks omitted).

Common sense says that if the government is content to leave tens of millions in plans that are not subject to the CASC Mandate, and if it believes this Mandate advances compelling interests, it must be that the government is satisfied with the other means by which women access contraceptives. Petitioners' briefs identify many less restrictive alternatives that the government could use to provide women enrolled in ministries' health plans free and convenient access to CASC services. See Br. for Petitioners, *Zubik*, at 75–82; Br. for Petitioners, *ETBU*, at 72–78.

C. Of the less restrictive alternatives at the government's disposal, Title X is particularly well suited to extending access to those who work for religious employers.

One of the less restrictive alternatives identified by Petitioners, Title X, deserves special mention. Title X—"The National Family Planning Program"—is operated by HHS. Dep't of Health & Human Servs., *Title X Family Planning*, http://www.hhs.gov/opa/title-x-family-planning/ (last visited Jan. 7, 2016). The Title X program has an annual budget of over $280 million and is "dedicated solely to

providing individuals with comprehensive family planning and related preventive health services." *Id.*

The government has given this Court two reasons why this proposed less restrictive means is unacceptable. First, HHS is obligated by law to reserve Title X serves for "low-income families." Memo. For Resp'ts in Opp. at 32, *Wheaton College* v. *Burwell*, 134 S. Ct. 2806 (2014) (No. 13A1284). As such, "patients whose income exceeds 250% of the federal poverty level *must* pay the reasonable cost of any services." *Id.* "[T]hus," the government contends, "Title X is not available to provide contraceptive coverage for employees and students of objecting organizations." *Id.* at 33.

Second, the government said that using Title X would be unacceptable because it would create unacceptable "logistical and administrative obstacles" and would "[i]mpos[e] additional barriers to women receiving the intended coverage." *Id.* (citations omitted).

The government's account is incomplete and misleading. HHS could unilaterally make Title X funds available to women who work for religious ministries and The Guttmacher Institute has found that Title X is better than traditional insurance at "removing obstacles" to contraceptive access.

1. HHS already uses Title X to guarantee minors free contraceptives without parental consent.

While 42 U.S.C. § 300a-4(c) instructs HHS to give "priority" to "low-income families" in awarding Title X grants, Congress explicitly gave the Secretary of HHS broad discretion to define "low-income family"

"in accordance with such criteria as he may prescribe."[13]

HHS is exercising this authority today, ignoring the Poverty Guidelines in order to advance its policy objectives. HHS has rewired its definition of "low-income family" to include "unemancipated minors who wish to receive [family planning] services on a confidential basis." 42 C.F.R. § 59.2. If HHS is willing to use Title X to help minors get contraceptives without their parents' knowledge or consent, there is no reason HHS could not also open Title X to women who work for ministries with religious objections to the CASC Mandate.

2. Title X is better than traditional insurance at "removing obstacles" to contraceptive access.

While the government has told this Court that providing CASC services through Title X poses unacceptable "logistical and administrative obstacles," Memo. For Resp'ts in Opp. at 31, *Wheaton College* v. *Burwell*, 134 S. Ct. 2806 (2014) (No. 13A1284), The Guttmacher Institute disagrees. The Guttmacher Institute's views on Title X are significant because the IOM relied on Guttmacher's

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[13] It is highly ironic that HHS has denied it has authority to define who can have access to Title X funds. As part of this same litigation, Respondents have asserted that DOL has the "broad rulemaking authority" to create plan administrators when Congress specified in ERISA Section 3(16)(A), 29 U.S.C. § 1002(16)(A), that DOL may do so only for orphan plans. Here, by contrast, Congress has explicitly given HHS the power to define "low-income family," and HHS has already used this power to advance other policy objectives.

research and advice throughout its 2011 report, which served as the basis for the CASC Mandate.[14]

According to Guttmacher, Title X is *better than* traditional health insurance at "helping clients obtain—and quickly begin using—a contraceptive method best suited to them." Rachel Benson Gold, *Going the Extra Mile: The Difference Title X Makes*, Guttmacher Policy Rev., Spring 2012, at 13-14. Title X excels at "removing obstacles" to contraceptive access because funded clinics are "more likely to provide contraceptives on-site, rather than giving women a prescription that must be filled at a pharmacy." *Id.* at 14. "Doing so can be critically important" because giving a woman a prescription that must be filled elsewhere "requires a woman to make two trips to get the contraceptives she needs." *Id.* This "can be a significant obstacle for a woman who is juggling the demands of school, family, or work." *Id.* at 15. "This emphasis on clearing obstacles to contraceptive use" is something that Guttmacher believes makes Title X clinics superior to other women's health clinics. *Id.*

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[14] IOM Report at 62, 108, 109 (2011) (citing The Guttmacher Institute); see also *Hobby Lobby*, 134 S. Ct. at 2788–89 (HRSA developed the CASC Mandate based on recommendations made in the IOM Report). The Guttmacher Institute is the former research affiliate of Planned Parenthood and focuses on "advancing sexual and reproductive health worldwide through research, policy analysis and public education." The Guttmacher Institute, *About*, https://www.guttmacher.org/about/ (last visited Jan. 8, 2016).

CONCLUSION

For these reasons, the Knights of Columbus prays that this Court reverse the judgment of the Court of Appeals.

Respectfully submitted,

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